

# CAPLAW NATIONAL TRAINING CONFERENCE

## BEYOND THE HANDSHAKE: CONTRACTS 101

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## What is a Contract?

A legally binding and enforceable agreement between two or more competent parties to perform (do) or not to perform (do) a particular thing. A valid contract is required to have the following factual elements:

1. an offer
2. an acceptance of the offer (meeting of the minds)
3. valuable consideration (\$/a promise not to do something otherwise entitled to do/acceptance of liability)

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## Oral vs. Written Contracts

Some oral contracts are enforceable if all elements of valid contract fulfilled.

1. More difficult to prove
2. Statute of Limitations shorter period

Other contracts must be in writing (purchase of real property, lease etc.)

1. Court will enforce the terms
2. Court will not make contracts

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## Subgrant or Contract?

### Grantee and Subgrantee

1. Grantee solely accountable to awarding agency for all grant related activities performed and funding received by subgrantee
2. Grantee responsible for documentation of expenditures by subgrantee

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## Procurement Contracts

OMB Circular A-110 – Uniform Administrative Requirements for Awards and Subawards to Institutions of Higher Education, Hospitals, Other Nonprofit Organizations, and Commercial Organizations (2 C.F.R. 215)

### Procurement Standards

#### Sec.215.40 Purpose

- a. Supplies and other expendable property

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## Procurement Standards

- b. Equipment
- c. Real property
- d. Other services

### For direct benefit of Grantee

#### Sec.215.41 Recipient responsibilities

- a. Do not relieve of contractual responsibilities
- b. No recourse to Federal Government

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## Procurement Standards

### Sec.215.42 Codes of Conduct

- a. Written standards (applicable to officers, employees, consultants, governing board members)
- b. Conflict of interest
- c. Disciplinary actions

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## Procurement Standards

### Sec.215.43 Competition

- a. Maximum extent practicable, open and free competition
- b. Organizational conflict of interest
- c. Restriction against developers of specifications, requirements, etc.
- d. "Most advantageous to the recipient, price, quality and other factors considered"

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## Procurement Standards

### Sec.215.44 Procurement procedures

- a. Written - avoid purchasing unnecessary items, lease purchase analysis, solicitations provide for- clear and accurate description, requirements to fulfill and factors to be evaluated, description of technical requirements, specific features if "brand name or equal" are used, acceptance, if feasible, of metric, preference, if feasible, of recycled

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## Procurement Standards

- b. Small business, minority-owned firms, women's businesses -
- c. Type of procuring instruments (fixed price contract, cost reimbursable contracts, purchase orders and incentive contracts) for the best interest of the program
- d. Responsible contractors with potential to perform -integrity, record of performance, financial & technical resources - no "Debarment and Suspension"

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## Procurement Standards

- accessibility to other necessary resources
- e. Documents available for Federal review, when: procedures or operation fail to comply; exceed small purchase threshold fixed at 41 U.S.C. 403 (11) (\$100,000) without competition or one bid/proposal; exceed small purchase specifies a "brand name" product; exceed small purchase and award to other than low bidder under a sealed bid; and contract modifications changes scope or

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## Procurement Standards

increase contract amount more than small purchase threshold

### Sec.215.45 Cost and price analysis

- a. Every procurement - made and documented
- b. Price analysis - comparison of prices
- c. Cost analysis - review and evaluation of elements of costs to determine reasonableness, allocability, and allowability

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## Procurement Standards

### Sec.215.46 Procurement records

In excess of small purchase threshold

- a. Basis of selection
- b. Justification if lack of competition
- c. Basis for award cost or price

### Sec.215.47 Contract administration

- a. System shall be maintained to ensure
  - Contractor conformance
  - Adequate and timely follow-up
  - Evaluation of contractor performance

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## Procurement Standards

### Sec.215.48 Contract provisions

Additional provisions to be used and applied to subcontracts as well for a sound and complete agreement

- a. Contracts in excess of small purchase threshold require administrative, contractual or legal remedies when contractor violates or breaches contract terms and remedial actions as appropriate

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## Procurement Standards

- b. Contracts in excess of small purchase threshold require termination and basis of settlement- Default-Circumstances beyond control of contractor
- c. Construction or facility improvements recipient follow own requirements relating to bid guarantees, performance bonds, and payment bonds-Over \$100,000.00 awarding agency may accept recipients requirements, if not then bid guarantee of 5% of bid price, performance bond for

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## Procurement Standards

100% of contract price (fulfillment of contractor's obligations), payment bond 100% of contract price (assure payment required by statute of persons supplying labor and materials), issued by acceptable surety (31 C.F.R. part 223, "Surety Companies Doing Business with the United States.")

- d. All negotiated contracts, except less than small purchase threshold, must have provision for access to any books, documents, papers and records of contractor by recipient, awarding agency,

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## Procurement Standards

the Controller General of the U.S. or authorized representative.

- e. **All contracts – required to contain contract provisions in Appendix A of OMB Circular A-110**

### Contract closeout

All services performed and products delivered– administrative actions complete and final payment made

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## Do's and Don'ts of Review and Negotiation of Contracts

- ▶ Use standard generic form entitled "Contract"
- ▶ ID parties with correct name and address
- ▶ Date of contract
- ▶ Number common sense headings such as: "Period of Contract", "Contract Amount", "Scope of Services", "Insurance", "Warranties" "Termination" etc.
- ▶ Establish objective measures of performance
- ▶ Include OMB Circular A-110 Appendix A Contract Provisions

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### Do's and Don'ts of Review and Negotiation of Contracts

- ▶ Define technical terms
- ▶ Carefully review contract terms and conditions as well as punctuation marks
- ▶ Carefully review conjunctions “and” and “or”
- ▶ Ask questions and once an understanding is determined, include the answer in the contract as you understand it
- ▶ Have your attorney review before execution
- ▶ Notarize if required
- ▶ Retain copy

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### Do's and Don'ts of Review and Negotiation of Contracts

- ▶ Don't read over contract by just scanning or hurriedly
- ▶ Don't accept other parties oral explanation of a confusing term
- ▶ Don't start performing terms of contract until fully executed (both parties have signed)
- ▶ Don't orally modify contract
- ▶ Don't assume standard contract or form contract does not need to be reviewed by your attorney

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### Do's and Don'ts of Review and Negotiation of Contracts

- ▶ Negotiate “hold harmless”, “save harmless” or “indemnify” (paying contractor's liabilities)
- ▶ Negotiate acceleration clause or “all payments immediately due” upon breach of contract or default
- ▶ Negotiate late payment penalties or finance charges
- ▶ Negotiate clauses that subject contract to substantive law or jurisdiction of state
- ▶ Sovereign immunity; prohibition against agency debt; right to suit

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### **Do's and Don'ts of Review and Negotiation of Contracts**

- ▶ Negotiate alterations to State general law of contract (statute of limitations to bring claim or sue for breach of contract)
- ▶ Negotiate termination clause due to reduction or loss of funding
- ▶ Negotiate binding arbitration or any mandatory dispute resolution (not an option unless union contract)
- ▶ Negotiate clause that breach would cause irreparable harm and justify injunctive action
- ▶ Negotiate assignment of rights to payment to

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### **Do's and Don'ts of Review and Negotiation of Contracts**

third party without subjecting third party to all the defenses and claims recipient would have against contractor (not an option)

- ▶ Negotiate confidentiality or non-disclosure provisions, if warranted
- ▶ Negotiate payment upon receipt and approval of invoice
- ▶ Negotiate recipient payment of attorney fees, court costs, or other litigation expenses of the contractor if dispute (not an option)

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### **Do's and Don'ts of Review and Negotiation of Contracts**

- ▶ Negotiate automatic renewal or renewal unless affirmative action taken by recipient
- ▶ Negotiate use of recipients name in advertising, endorsement or promotion
- ▶ Negotiate contractor's right to terminate contract
- ▶ Negotiate insurance or bond if required
- ▶ Negotiate "ensure" to "best efforts"
- ▶ Negotiate recourse and remedies if all else fails

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## Breach of Contract

- ▶ Party fails to fulfill duties under the contract terms
  - a. Party does not perform as promised
  - b. Party does something that makes it impossible for the other party to perform duties under the contract
  - c. Party makes clear that they do not intend to perform the contract duties

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## Damages for Breach of Contract

- ▶ Party who performed entitled to various remedies
  - a. **Consequential damages**– breaching party to pay the non-breaching party an amount that puts the non-breaching party in same position if contract performed
  - b. **Punitive damages**– courts force breaching party to make payment as punishment for the breach of contract

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## Damages for Breach of Contract

- ▶ **Liquidated damages**– Parties agree at time of contract agreed upon that the breaching party will pay a specified sum
- ▶ **Nominal damages**– Minimal amount provided to non-breaching party is that party won the case but did not financially lose much

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**Other Remedies for Breach of Contract**

**Specific Performance**  
Court require performance

**Rescission**  
Court pretend contract never existed

**Filing a Breach of Contract Lawsuit**  
Statute of Limitations  
Claims

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**Useful Links**

- ▶ Grant Regulations  
[http://www.cns.gov/for\\_organizations/manage/index.asp](http://www.cns.gov/for_organizations/manage/index.asp)
- ▶ OMB Regulations  
<http://www.whitehouse.gov/omb/circulars>
- ▶ Federal Register (Code of Federal Regulations)  
<http://www.gpoaccess.gov/fr/index.html>

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